

DECISION AND FINDINGS
IN THE
CONSISTENCY APPEAL OF
CARLOS A. CRUZ COLON FROM
AN OBJECTION BY THE
PUERTO RICO PLANNING BOARD

September 27, 1993

SYNOPSIS OF DECISION

Mr. Carlos A. Cruz Colón (Appellant) is the owner of an improved lot located adjacent to the Torrecillas Lagoon in Carolina, Puerto Rico. The Appellant proposes to construct an "L"-shaped wood pier that would be 36 feet in one length and 30 feet in the other length (or, in the alternative, a boardwalk.) The boardwalk/pier would be used by the Appellant for private recreational purposes.

On January 30, 1991, the Appellant applied to the U.S. Army Corps of Engineers (Corps) for a permit to construct the proposed project. In conjunction with that Federal permit application the Appellant submitted a certification that the proposed activity is consistent with Puerto Rico's federally approved Coastal Management Program (CMP). The Puerto Rico Planning Board (PRPB), the Commonwealth of Puerto Rico's coastal management agency, reviewed the certification pursuant to section 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (CZMA), 16 U.S.C. § 1456(c)(3)(A).

On July 29, 1991, the PRPB objected to the Appellant's consistency certification for the proposed project on the ground that it violates Puerto Rico's CMP policies which provide for the protection of natural and environmental resources from destruction or irreparable damage, the reduction of adverse impacts of pollution on natural resources, and avoidance of activities which could cause the deterioration of natural systems, including mangroves. The PRPB recommended as an alternative that the Appellant construct a public facility for the use of area residents.

Under section 307(c)(3)(A) of the CZMA and 15 C.F.R. § 930.131 (1988), the PRPB's consistency objection precludes the Corps from issuing a permit for the activity unless the Secretary of Commerce (Secretary) finds that the activity is either consistent with the objectives of the CZMA (Ground I) or necessary in the interest of national security (Ground II). If the requirements of either Ground I or Ground II are met, the Secretary must override the PRPB's objection.

By letter dated August 26, 1991, in accordance with section 307(c)(3)(A) of the CZMA and 15 C.F.R. Part 930, Subpart H, the Appellant filed with the Department of Commerce (Department) a notice of appeal from the PRPB's objection to the Appellant's consistency certification for the proposed project. The Appellant based his appeal on Ground I and did not plead Ground II.

To find that a proposed activity satisfies Ground I, the Secretary must find that the activity satisfies all four of the elements specified in 15 C.F.R. § 930.121. The fourth element of Ground I, 15 C.F.R. § 930.121(d), requires that there is no

reasonable alternative to the Appellant's proposed project available that would permit the activity to be conducted in a manner consistent with Puerto Rico's CMP. Based upon information submitted by the Appellant, the PRPB and Federal agencies, the Secretary found that the alternative identified by the PRPB in its consistency objection was both an available and reasonable alternative that would be consistent with Puerto Rico's CMP. Accordingly, the Secretary held that the fourth element of Ground I was not satisfied. Because the fourth element of Ground I was not met, it was therefore unnecessary for the Secretary to examine the other three elements.

Conclusion

Because the Appellant's proposed project failed to satisfy the requirements of Ground I, the Secretary did not override the Commonwealth's objection to the Appellant's consistency certification, and consequently, the proposed project may not be permitted by Federal agencies.

DECISION

I. Background

Mr. Carlos A. Cruz Colón (Appellant) is the owner of an improved lot within a controlled-access development located adjacent to the Torrecillas Lagoon, in Carolina, Puerto Rico. Letter of Carlos A. Cruz¹ to the Secretary of Commerce, dated February 21, 1992 (Appellant's Initial Brief), at 1. The Appellant's property comprises an unspecified length of shoreline adjacent to the Torrecillas Lagoon.² Appendix 1, Attachment, Puerto Rico Planning Board (PRPB) Initial Brief.

Initially, the Appellant proposed to construct an "L"-shaped wood pier that would be 36 feet in one length and 30 feet in the other length. PRPB Initial Brief at 1. By letter dated June 14, 1991,³ the Appellant proposed to modify his project by constructing a boardwalk, rather than an "L"-shaped pier. *Id.* at 2. The site of the proposed boardwalk/pier⁴ is located within an area designated as one of Puerto Rico's Critical Coast Wildlife Areas. *Id.* A belt of mangroves 15 meters wide parallels the shore adjacent to the Appellant's property and neighboring properties. *Id.* at 3. The Appellant proposes to construct the boardwalk/pier "under the existing mangrove canopy." Appellant's Initial Brief at 1. The project site lies within an area of public domain pursuant to "Law number 23 of the Commonwealth of Puerto Rico (Organic Law of the Department of Natural Resources of June 20, 1972)."⁵ Certification of Project Consistency with the Puerto Rico Coastal Management Program (PRPB Objection Notice) at 2. The boardwalk/pier will be used by the Appellant and his guests for private recreational purposes. Appellant's Initial Brief at 1.

¹ During the course of this appeal, the Appellant signed his name as "Carlos A. Cruz Colón" and "Carlos A. Cruz".

² The Appellant owns one of 30 condominiums having lots adjacent to the Torrecillas Lagoon within the Vistamar Princess development; a new residential complex in Carolina, Puerto Rico. Puerto Rico Planning Board (PRPB) Response to Appellant's Supporting Information and Brief, dated June 3, 1992 (PRPB Initial Brief at 3).

³ The Appellant's June 14, 1991, correspondence, which purportedly requests a modification of his proposal, is not contained in the administrative record. Neither the Appellant nor the PRPB submitted any documentation for this proposed modification. The significance, if any, of this proposed modification to the Appellant's initial proposal will be discussed *infra* at 11.

⁴ The Appellant, himself, is not precise on the terminology for his proposal, referring to his project as a "pier or boardwalk" and "pier or deck". See Letter of Carlos A. Cruz Colón to Ms. Margo E. Jackson, Assistant General Counsel for Ocean Services, National Oceanic and Atmospheric Administration (NOAA), dated August 19, 1992 (Appellant's Final Brief) and Letter of Carlos A. Cruz to the Secretary of Commerce, dated August 26, 1991 (Appellant's Notice of Appeal).

⁵ The Appellant does not contest the PRPB's claim that the project site is located within an area of public domain. In fact, he states "[a]t no moment do I want to claim private property rights of this pier." Appellant's Notice of Appeal, at 2.

On January 30, 1991, the Appellant applied to the U.S. Army Corps of Engineers (Corps) for a permit⁶ to construct the pier. In conjunction with that Federal permit application the Appellant submitted to the Corps a certification that the proposed activity was consistent with Puerto Rico's federally approved Coastal Management Program (CMP). The PRPB⁷ reviewed the certification pursuant to section 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (CZMA), 16 U.S.C. § 1456(c)(3)(A).

On July 29, 1991, the PRPB objected to the Appellant's consistency certification for the proposed project on the ground that it violates Puerto Rico's CMP policies numbered 18.00, 18.01 and 18.03, which provide, respectively, for: the protection of natural and environmental resources from destruction or irreparable damage; the reduction of the adverse impacts of pollution on natural resources; and the avoidance of activities which could cause the deterioration of natural systems, including mangroves and habitats of endangered species. PRPB Objection Notice at 2-3. Of specific concern to the PRPB is its contention that the Appellant's proposed project will adversely impact a relatively intact mangrove stand and establish a negative precedent for private use piers in an area of the Torrecillas Lagoon containing one of the largest remaining mangrove stands in Puerto Rico. Id. The PRPB recommended as an alternative that the Appellant construct a "public facility for the use of all the residents of the area". Id. at 3.

Under section 307(c)(3)(A) of the CZMA and 15 C.F.R. § 930.131, the PRPB's consistency objection precludes the Corps from issuing a permit for the activity unless the Secretary of Commerce (Secretary) finds that the activity may be federally approved, notwithstanding the PRPB's objection, because the activity is either consistent with the objectives or purposes of the CZMA (Ground I), or necessary in the interest of national security (Ground II).

II. Appeal to the Secretary of Commerce

By letter dated August 26, 1991, in accordance with section 307(c)(3)(A) of the CZMA and 15 C.F.R. Part 930, Subpart H, the Appellant filed with the Secretary a notice of appeal from the PRPB's objection to the Appellant's consistency certification for the proposed project. Appellant's Notice of Appeal. On June 3, 1992, the PRPB filed a response to the appeal, after the Appellant perfected his appeal by filing supporting data and

⁶ The Corps permit is required by section 404 of the Federal Water Pollution Control Act, as amended, (Clean Water Act), 33 U.S.C. § 1344.

⁷ The PRPB is Puerto Rico's federally approved coastal management agency under sections 306 and 307 of the Coastal Zone Management Act of 1973, as amended (CZMA) and implementing regulations at 15 C.F.R. Parts 923 and 930.

information.⁸ The Appellant based his appeal on Ground I and did not plead Ground II.

On March 20, 1992, the Department solicited the views of four Federal agencies⁹ on the four regulatory criteria of Ground I¹⁰ that the Appellant's proposed project must meet for the Secretary to find it consistent with the objectives or purposes of the CZMA. All of the Federal agencies responded. Public comments on issues germane to the decision in the appeal were also solicited by public notices published in the Federal Register, 57 Fed. Reg. 10,649 (March 27, 1992), and the San Juan Star, (March 25, 26 & 27, 1992). No comments were received from the general public.

After the public comment period closed, the Department provided the Appellant and the PRPB with an opportunity to file final responses to any submission filed in the appeal. Both the Appellant and the PRPB submitted final briefs. All documents and information received by the Department during the course of this appeal have been included in the administrative record. However, I will only consider those documents and information relevant to the statutory and the regulatory grounds for deciding an appeal.¹¹

III. Threshold Issue

In his initial brief, the Appellant raises a threshold issue relating to the adequacy of the PRPB's objection. The Appellant charges that the PRPB failed to state reasons in its objection why his proposed project is not consistent with Puerto Rico's CMP. See Appellant's Initial Brief at 2. I will address this issue before deciding whether the grounds for a Secretarial override have been met.

Consistent with Secretarial determinations in prior consistency appeals, I do not consider whether the PRPB complied with state law in determining that the proposed activity was inconsistent

⁸ The Appellant failed to submit a copy of his initial brief to the PRPB as required by the regulations at 15 C.F.R. § 930.125(a). The PRPB believed that the Appellant had allowed the appeal to lapse until notice of the appeal and a request for comments was published in the Federal Register. Letter of Patria G. Custodio, Director, PRPB, to Ms. Margo E. Jackson, NOAA, dated June 3, 1992, (Cover Letter to PRPB Initial Brief). The Department forwarded a copy of the Appellant's Initial Brief, which was received by the PRPB on April 29, 1992. Id. The PRPB timely filed its initial brief on June 3, 1992.

⁹ Comments were requested from the Fish and Wildlife Service (FWS), the Environmental Protection Agency (EPA), the National Marine Fisheries Service (NMFS) and the Corps.

¹⁰ These criteria appear at 15 C.F.R. § 930.121, and are discussed infra at 4-5.

¹¹ See Decision and Findings in the Consistency Appeal of Henry Crosby, December 29, 1992, at 2; citing Decision and Findings in the Consistency Appeal of Amoco Production Company, July 20, 1990, at 4.

with Puerto Rico's CMP.¹² Rather, the scope of my review of the PRPB's objection is limited to determining whether the objection was properly lodged, *i.e.*, whether the PRPB complied with the requirements of section 307(c)(3)(A) of the CZMA and implementing regulations at 15 C.F.R. § 930.64(a)&(b).¹³ Those sections provide that the PRPB's objection must describe how the proposed project is inconsistent with specific, enforceable elements of Puerto Rico's CMP.

As I previously stated *supra* at 2, the PRPB objection notice cites policies which provide for the protection of natural resources and the reduction of the adverse impacts of pollution on those resources, as well as a policy opposing activities deemed to contribute to the deterioration and destruction of natural resources, such as mangroves. PRPB Objection Notice at 3. The policies cited by the PRPB are enforceable parts of Puerto Rico's CMP. *See* PRPB Initial Brief at 8-9. Consistent with prior consistency appeal decisions,¹⁴ I find that the PRPB objection contains sufficient detail and explanation to satisfy the requirements of 15 C.F.R. § 930.64(b). Because the PRPB's objection was timely made and describes how the Appellant's proposed activity is inconsistent with specific, enforceable elements of Puerto Rico's CMP, I find that the PRPB's objection was properly lodged.

IV. Grounds for Overriding a State Objection

Section 307(c)(3)(A) of the CZMA provides that Federal licenses or permits required for a proposed activity may be granted despite a valid consistency objection if the Secretary finds that the activity is (1) consistent with the objectives of the CZMA (Ground I) or (2) otherwise necessary in the interest of national security (Ground II). *See also* 15 C.F.R. § 930.130(a). The Appellant has pleaded only the first ground for a Secretarial override.

To find that the proposed activity satisfies Ground I, the Secretary must determine that the activity satisfies all four of the elements specified in 15 C.F.R. § 930.121. Failure to satisfy any one of these elements precludes a finding that the project is consistent with the objectives of the CZMA. The four elements are:

¹² *See* Decision and Findings in the Consistency Appeal of Roger W. Fuller (Fuller Decision), October 2, 1992, at 5; *citing* Decision and Findings in the Consistency Appeal of Korea Drilling Company, Ltd. (Korea Drilling Decision), January 19, 1989, at 3-4.

¹³ *See* Decision and Findings in the Consistency Appeal of Claire Pappas, October 26, 1992, at 3; *citing* Decision and Findings in the Consistency of José Pérez-Villamil, November 20, 1991, at 3.

¹⁴ *See, e.g.*, Decision and Findings in the Consistency Appeal of the Asociación de Propietarios de los Indios, Inc., February 19, 1992, at 6-7.

1. The proposed activity furthers one or more of the competing national objectives or purposes contained in §§ 302 or 303 of the CZMA. 15 C.F.R. § 930.121(a).

2. When performed separately or when its cumulative effects are considered, [the proposed activity] will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest. 15 C.F.R. § 930.121(b).

3. The proposed activity will not violate any of the requirements of the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended. 15 C.F.R. § 930.121(c).

4. There is no reasonable alternative available (e.g., location[,] design, etc.) that would permit the [proposed] activity to be conducted in a manner consistent with the [PRPB's coastal] management program. 15 C.F.R. § 930.121(d).

In its notice of objection, the PRPB has suggested an alternative that would permit the activity to be conducted in a manner consistent with Puerto Rico's CMP. Because Element Four is dispositive of this case, I will turn immediately to consideration of that element.

V. Element Four

In past consistency appeal decisions, previous Secretaries have reached a determination on the fourth element of Ground I by evaluating the alternative(s) proposed by a state (including Puerto Rico) in the consistency objection.¹⁵ The Department's regulations at 15 C.F.R. § 930.121(d) read together with the regulations at 15 C.F.R. § 930.64(b)(2)¹⁶ place the burden of describing existing alternatives that would permit the proposed activity to be conducted in a manner consistent with a state's (including Puerto Rico) CMP on the objecting state coastal management agency.¹⁷

¹⁵ See Decision and Findings in the Consistency Appeal of A. Elwood Chestnut (Chestnut Decision), November 4, 1992, at 5; citing Decision and Findings in the Consistency Appeal of Sucesión Alberto Bachman (Bachman Decision), October 10, 1991, at 4, and previous decisions cited therein.

¹⁶ The regulations at 15 C.F.R. § 930.64(b)(2) provide, in part, that: "State agency objections must describe . . . alternative measures (if they exist) which, if adopted by the applicant, would permit the proposed activity to be conducted in a manner consistent with the management program."

¹⁷ See Chestnut Decision at 5; citing Bachman Decision at 4-5. See also Korea Drilling Decision at 23.

As discussed in the Decision and Findings in the Consistency Appeal of A. Elwood Chestnut (Chestnut Decision)¹⁸, the provisions requiring a state to identify alternatives serve two purposes:

First, it gives the applicant a choice: adopt the alternative (or, if more than one is identified adopt one of the alternatives) or, if the applicant believes all alternatives not to be reasonable or available, either abandon the proposed activity or appeal to the Secretary and demonstrate the unreasonableness or unavailability of the alternatives. Second, it establishes that an alternative is consistent with a State's program because the State body charged by the Act with determining consistency makes the identification of the alternative.

Chestnut Decision at 5-6; citing Bachman Decision at 4-5.

As I have previously stated, in its objection, the PRPB has described an alternative that would permit the activity to be conducted in a manner consistent with Puerto Rico's CMP. The PRPB has proposed that the Appellant can comply with Puerto Rico's enforceable coastal management policies by constructing a "public facility for the use of all the residents of the area". PRPB Objection Notice at 3. The burden therefore shifts to the Appellant to demonstrate that the alternative identified by the PRPB is unavailable or unreasonable.¹⁹

In the context of this case, unavailability means that the alternative proposed by the PRPB will not allow the project to achieve its primary purpose.²⁰ The primary purpose of the proposed project, as stated by the Appellant in his Corps Permit Application, is to provide a boat access for recreational purposes. Corps Permit Application. In fact, the Appellant argues that there is a basic need for his project because "in the entire San Juan area there is not a single public marina or boat access ramp." Appellant's Initial Brief at 2. Further, the Appellant states that "[t]here is not a single public boat facility in this lagoon. . . . You must be a member of the only two yacht [sic] clubs or pay in the only private marina located in the San Juan harbor, far away from this location." Id. at 3.

¹⁸ See footnote 15, supra.

¹⁹ See Chestnut Decision at 6; citing Korea Drilling Decision at 22-23.

²⁰ See Decision and Findings in the Consistency Appeal of Yeamans Hall Club (Yeamans Hall Decision), August 1, 1992, at 5. A project that is technically infeasible (a project for which technology and/or resources do not exist) would also be an unavailable project. See Decision and Findings in the Consistency Appeal of Exxon Company, U.S.A. (Exxon SRU Decision), November 14, 1984, at 14.

However, the Appellant opposes²¹ the suggested alternative of constructing a public facility, arguing that the alternative is "not a practical one" and that "[o]nly residents and guests will have access [to the site] and only through [his] apartment" because the condominium development's control gates preclude access of the general public to the site. Appellant's Initial Brief at 3.

The PRPB addresses the Appellant's arguments by asserting that he does not "discuss the reasons to consider the alternative as not acceptable for the use of Vistamar's Residents." PRPB Initial Brief at 6. In support of its position, the PRPB argues:

The control gates which limits [sic] the access to the proposed project are not a reason to justify that the pier could not be used for public use. Our alternative is addressed principally to the use of Vistamar Princess residents. Although the Appellant stated that only the residents and guests have access through the gates and his property, he did not submit any information to modify or redesign the project to provide adequate access to other residents, neither considered the alternative [sic] as reasonable for his own neighbors.

PRPB Initial Brief at 13.

As additional support of its position that the Appellant has the available option of constructing a communal facility, the PRPB cites the agreement of the Appellant's neighbor with its suggestion of constructing a public facility on a communal lot, adjacent to the Appellant's lot.²² PRPB Final Brief at 3. Similarly, the FWS responded to the request for comments by Federal agencies on the instant appeal, stating that the FWS has consistently recommended denial of permits for private docks, decks, or catwalks in the area, but has endorsed the development of public facilities. FWS May 18, 1992, Letter.

²¹ The Appellant's statements regarding the PRPB's suggested alternative are imprecise and oftentimes contradictory. For example, in his notice of appeal, the Appellant stated that he "gladly acquiesced to [the] 'alternative'." Appellant's Notice of Appeal at 2. A careful review of the record supports a finding that the Appellant does not agree with the PRPB's suggested alternative. Rather, as the PRPB points out in its Initial Brief, the "alternative was provided to the Appellant but he rejected it." PRPB Initial Brief at 14. The PRPB was referring to a three-way meeting held on August 13, 1992, between the Appellant's chosen representative (Mr. Alfonso Cruz Colón), the Appellant's immediate neighbor and the PRPB, at which time the Appellant's representative "insisted on the private pier" although the PRPB suggested the alternative of a community pier. *Id.* at 13.

²² The Appellant's immediate neighbor filed an application for a private pier two months after the Appellant submitted his application. See Letter of Richard M. Smith, Deputy Director, FWS, to Ms. Margo E. Jackson, NOAA, dated May 18, 1992 (FWS May 18, 1992 Letter). However, at a meeting held on August 13, 1992, between the Appellant's representative, the Appellant's neighbor and the PRPB, the Appellant's neighbor agreed to the PRPB's suggestion of constructing a community facility on a communal lot adjacent to the Appellant's lot. PRPB Initial Brief at 13; PRPB Final Brief at 3.

I find the PRPB's counter-argument persuasive that the Appellant offers no reason why the boardwalk/pier should not be available for use by the Vistamar Princess residents. In this case, construction of a public facility for area residents would allow the project to fulfill its essential or primary purpose of providing boat access for recreational purposes on the Torrecillas Lagoon.²³ Accordingly, I find that the alternative proposed by the PRPB is available.²⁴

Having determined that the PRPB has identified an available alternative as discussed above, I must now determine whether the alternative is reasonable, i.e., economically feasible. In order to reach a determination whether the alternative identified by the PRPB is reasonable, I must weigh the advantages of the alternative against the estimated increased costs of the project.²⁵ In this case, balancing the advantages against the estimated increased costs requires the consideration of two balancing factors: first, the increased environmental benefits of the proposed alternative over those (if any) of the Appellant's proposed project, and second, the increased costs to the Appellant of carrying out the proposed alternative project.²⁶ I will address these factors in turn.

The Appellant argues that his proposal will have "absolutely no adverse impact . . . on the natural resources" of the area. Appellant's Notice of Appeal at 1. The Appellant states that he "will definitely not disrupt the continuity of the fringe mangrove along the Torrecillas Lagoon, since the pier or deck would be constructed "under the existing mangrove tree canopy." Id. The Appellant additionally argues that his "pier will provide habitat for the fish [and] other wildlife in the area." Id.

²³ The availability of a boat access ramp on the Torrecillas Lagoon necessarily addresses and fulfills the need for public boat facilities, which the Appellant asserts do not exist within the Torrecillas Lagoon and the San Juan area. In any event, the Appellant has not submitted any substantive evidence for the record concerning the availability of public facilities in the area. The Appellant argues that the public facilities cited by the PRPB in its initial brief are either not public or are inadequate for boat use. Appellant's Final Brief at 1-2. To support his claims, the Appellant submitted various photographs and a copy of unanswered correspondence addressed by the Appellant to the Puerto Rico Department of Natural Resources (DNR). See Attachments to Appellant's Final Brief. The PRPB response to the Appellant's claims was that, based upon their files and knowledge, there are public boat ramps and deck facilities in the Piñones State Forest which provide access to the Torrecillas Lagoon as well as a public boat ramp in Isla Grande, San Juan. PRPB Initial Brief at 14. The PRPB also stated that the DNR plans to construct a public boat ramp in the Torrecillas Lagoon. Id.

²⁴ See Yeamans Hall Decision at 5-6. The technical feasibility of this project is not at issue in this case. See Exxon SRU Decision at 14.

²⁵ See Chestnut Decision at 7, citing, Exxon SRU Decision at 14.

²⁶ See Yeamans Hall Decision at 6-7.

The response of the PRPB is that the proposed project will produce both "direct and cumulative [sic] impacts along the shoreline of the mangrove fringe." PRPB Final Brief at 2. The PRPB states:

First, the pier and its associated activities will impact the mangrove trees and the water quality of the lagoon. The pier structure by itself will disturb the growth of the mangroves, increase the erosion process, will disturb one of its functions as natural filters, and the discharge of any waste, such as littering, will affect the water quality. Second, the approval of this project will set a precedent that will lead [to] the beginning of an uncontrolled development of private piers along the mangrove fringe. There are 30 apartments adjacent to the lagoon that would entitle equal treatment. Consequently, the mangrove fringe will be harmed and the . . . water quality will drop significantly [sic].

PRPB Final Brief at 2.

The PRPB also made the following arguments:

It has been the experience of all the agencies that once one permit for a pier is issued in an area, several other permit applications are submitted in rapid succession [sic]. The problem in this area would be worst [sic] because each apartment follows a continuous pattern. . . . Moreover, the immediate apartment owner submitted an application for another private pier. Therefore, the approval of this project will lead to the beginning of an uncontrolled development within the mangrove fringe and as a consequence of such action will increase its deterioration and the Lagoon water quality will drop.

* * *

The construction of the proposed pier and its associated activities will produce a significant impact to the mangroves [sic] trees. The mangrove system is a natural resource with important valuable functions. It acts as buffers [sic] against natural catastrophes, refuges for wildlife, nurseries for marine life, as fishing and shellfishing areas. In addition, it acts as natural filters to purify water and prevents the erosion process.

PRPB Initial Brief at 10-11.

I find that the PRPB's position is supported by letters contained in the administrative record from the FWS to the PRPB and to the Department. When the FWS initially reviewed the Appellant's proposed project, the FWS noted its concern for the precedent

that the project could establish given the historical experience of the FWS that once a permit for one private pier is issued, other private permit requests are submitted "in rapid succession", leading to "uncontrolled development and fragmentation" of existing resources. Letter of Vance P. Vicente, Acting Field Supervisor, FWS, to Ms. Grizzette Davila, Secretary, PRPB, dated March 19, 1991 (FWS March 19, 1991 Letter). Furthermore, in response to the Department's request for comments by Federal agencies in the instant appeal, the FWS responded with the following:

The Torrecilla-Pinones complex is listed as a Critical Coastal Wildlife Area by the Puerto Rico Department of Natural Resources, and is included as part of the Boca de Cangrejos Special Planning Area. It is the largest contiguous mangrove-lagoon-beach complex left in the highly urbanized greater San Juan metropolitan area, and was identified as an area of concern because of existing and anticipated conflicts with development. Torrecilla Lagoon is a refuge for numerous migratory and resident bird species (over 87 species have been recorded) and provides estuarine habitat for fish and shellfish. With the elimination of many adjacent wetlands due to development, the mangrove fringe serves increasingly important functions as a buffer zone and filter strip for water runoff into the lagoon.

Because of these pressures, the [FWS] has consistently recommended denial of permits for private docks, decks, or catwalks in the area. Likewise, we have often endorsed the development of public facilities where use can be concentrated in small areas, minimizing the effects to the natural systems of the area. . . . Puerto Rico's Coastal Zone Management plan give highest priority to preservation of mangrove wetlands, in areas of particular concern, and lowest priority to all other uses.

FWS May 18, 1992, Letter.

The EPA also supports the position of the PRPB and the FWS²⁷ as evidenced by the EPA response to the Department's request for Federal agency comments:

Indirect effects associated with use of the pier (i.e., increased erosion, accidental fuel spills, littering, etc. will also increase the cumulative impact to the area.

EPA Letter.

²⁷ In response to the Department's request for Federal agency comments, the NMFS submitted a copy of NMFS correspondence directed to the Corps which stated that the "comments and recommendations . . . by the FWS also represent those of the NMFS." Letter of Andreas Mager, Jr., Assistant Regional Director, NMFS, to Area Engineer, San Juan Area Office, Corps, dated February 26, 1991 (NMFS Letter).

The Appellant does not argue the environmental benefits of his modified proposal for a boardwalk.²⁸ The PRPB response to the modification was delineated in its notice of objection. The PRPB stated that the Appellant's proposed modification does not significantly change the impact that the project would have in the area. PRPB Objection Notice at 2.

Weighing the comments of the PRPB, the Appellant and the Federal agencies commenting on this appeal, I am persuaded that the construction of a private boardwalk/pier as proposed by the Appellant would have the cumulative²⁹ effect of adversely impacting an intact mangrove wetland. PRPB Final Brief at 2. The PRPB's suggested alternative of providing a public facility for the use of area residents would not involve cumulative impacts to such an extent as a private boardwalk/pier because construction of individual private piers along the shoreline would be discouraged. *Id.* at 3. Furthermore, only one portion of the mangrove fringe would be impacted by the proposed alternative pier. *Id.* I therefore find that constructing a communal facility as proposed by the PRPB would have the environmental advantages of preserving a greater portion of the mangrove stand and related preservation of dwindling natural resources.

From the benefits of preserving a greater portion of the mangrove stand I must subtract the environmental advantages (if any) of the Appellant's proposal. The Appellant argues that the environmental advantages of his project include an improved habitat for marine life and the improvement of the "scenic characteristic". Appellant's Initial Brief at 2. However, the Appellant fails to submit any documentation to support these conclusory statements, or explain why the proposed alternative would be less environmentally beneficial. The PRPB counter-argues that the construction of a private pier, combined with its associated activities, and the precedent for additional, private piers, will negatively impact the mangrove system, impeding growth and natural functions. PRPB Initial Brief at 10-11. The PRPB's counter-argument is supported by comments submitted to the administrative record by the FWS,³⁰ which found that "[t]he cumulative impacts of such private piers in an area of dense multi-residential dwellings will fragment and eliminate the shoreline mangroves of the area." FWS May 18, 1992, Letter.

²⁸ See supra at 1.

²⁹ The term "cumulative effect" has been construed in prior consistency appeal decisions, as well as in the legislative history to the 1990 CZMA amendments, to mean the effects of an objected-to activity when added to the baseline of other past, present and reasonably foreseeable future activities. See e.g., Decision and Findings in the Consistency Appeal of Chevron U.S.A. Producing Inc., January 8, 1993, at 8; see also H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 970-72 (1990).

³⁰ As previously stated supra at 10, fn. 27, the comments of the FWS represent those of the NMFS. See also NMFS Letter.

Absent scientific evidence to the contrary, I will accept the conclusions of the resource management agencies commenting on this appeal.³¹ Upon examining the information contained in the record of this appeal, I find that constructing a communal facility as proposed by the PRPB would have "measurably less adverse effects on land and water resources of the coastal zone."³²

In order to complete my analysis of the reasonableness, or economic feasibility, of the PRPB's proposed alternative, I must turn my consideration to the second balancing factor and evaluate the increased costs to the Appellant of carrying out the proposed alternative project. The Appellant asserts that his initial project for an L-shaped pier would have the approximate construction cost of \$3,500 to \$8,000. Appellant's Initial Brief at 1. The Appellant has failed to submit any documentation to substantiate these costs, nor does he document the alternative costs for his modified, boardwalk proposal or the suggested alternative of constructing a community facility. Accordingly, based on the record, I cannot determine that there are any specific, increased construction costs associated with the PRPB's alternative.

The Appellant raises the issue that he must obtain public liability insurance "to be protected from the general public use" if a public facility is constructed. Appellant's Final Brief at 2. However, the Appellant has not provided supporting documentation substantiating his claims that his costs would include public liability insurance.³³

Upon examining the information in the record of this appeal, I find that there may be some increased costs involved in constructing the proposed alternative project. However, absent documentation relating to the actual costs of the alternative, I am unable to conclude that these costs outweigh the environmental advantages. Therefore, I am unable to conclude that the alternative project is unreasonable.

In accordance with the foregoing analysis, I find that there is an available, reasonable alternative that would permit the Appellant's proposed activity to be conducted in a manner

³¹ See Fuller Decision at 12-13.

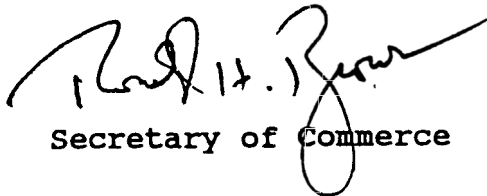
³² See Bachman Decision at 6, and cases cited therein.

³³ Presumably, the residents of the community could contribute monetarily to a communal facility. For example, even though the Appellant's immediate neighbor submitted an application for a private pier two months after the Appellant, at a meeting on August 13, 1991, with the PRPB and the Appellant's representative, the Appellant's neighbor agreed with the PRPB's suggestion of constructing a communal facility on a communal land lot. PRPB Initial Brief at 13. The Appellant does not address the issue raised by the PRPB of relocating a communal facility to a communal land lot.

consistent with Puerto Rico's CMP. Accordingly, the Appellant has failed to satisfy Element Four.

VI. Conclusion

Because the Appellant must satisfy all four elements of 15 C.F.R. § 930.121 in order for me to override the PRPB objection based on Ground I, failure to satisfy any one element precludes my finding that the Appellant's project is "consistent with the objectives or purposes of the [CZMA]." Having found that the Appellant has failed to satisfy the fourth element of Ground I, it is unnecessary to examine the other three elements. Accordingly, I will not override the PRPB's objection to the Appellant's proposed project.


Secretary of Commerce